United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7300

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

AMOCO SHIPPING COMPANY,

Plaintiff-Appellant,

vs.

HUMBLE OIL & REFINING COMPANY and M/T ESSO CONNECTICUT, her engines, tackle, etc, *in rem,*

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

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SECOND CIRCUIT

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AMOCO SHIPPING COMPANY,

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-against-

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT

Plaintiff-appellant, Amoco Shipping Co. (hereinafter called "shipowner") has appealed from an Order of the United States District Court for the Southern District of New York, Frankel D. J., dated April 14, 1975, entering judgment dismissing the complaint against defendants, Humble Oil & Refining Co. and the m/t Esso Connecticut.

The action was commenced in the District Court by shipowner to recover damages sustained by its vessel, the s/s Amoco Delaware, on April 14, 1972, as a result of the negligent contact of the m/t Esso Connecticut with the starboard side shell plating of the s/s Amoco Delaware.

The complaint was subsequently amended on August 30, 1974 to include a second cause of action against Humble Oil & Refining Co. (hereinafter called "charterer") for breach of the charter party, which charter was incorporated by reference.

Defendants answered the amended complaint and counterclaimed against shipowner for negligently failing to prevent the collision. The counterclaim was dismissed at trial and is not presently before this Court.

This non-jury action was tried before Honorable Marvin E. Frankel, U.S.D.J., on February 10 and 11, 1975 and the Findings of Fact and Conclusions of Law were filed on April 14, 1975.

THE FACTS

On the 30th day of March, 1972, the plaintiff, Amoco Shipping Company and the defendant, Humble Oil & Refining Company, entered into a charter party designated as Essovoy, 1969, for the use of the s/s Amoco Delaware. (Ex. 7)* At that time, the plaintiff was the operator and bareboat charterer of the s/s Amoco Delaware, a turbine powered steam vessel of 27,770 deadweight tons, a length overall of 633 feet and a breadth of 74 feet. The vessel was constructed in 1944 and rebuilt in 1971.

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* Hereinafter references to Exhibits will be designated as "Ex."; to the Trial Transcript as "T"; and to the Joint Appendix as "JA".

Pursuant to said charter party, the s/s Amoco Delaware was loaded at Humble Oil Refinery, Baytown, Texas, with a cargo of kerosene and No. 2 oil and, pursuant to defendant's orders, proceeded to Port Jefferson, New York to discharge.

The vessel anchored approximately 1/4 mile off the Port Jefferson sea buoy on April 13, 1972, at approximately 1430 hours. Upon arrival the mean draft of the s/s Amoco Delaware was 33 feet, 2 inches and neither Port Jefferson Harbor nor the Consolidated Oil Berth, the berth to which she was directed to discharge, was capable of receiving a vessel of such a draft. (Ex.3; JA-62,137). At the time the charter party was entered into, a deep arrival draft was anticipated. Accordingly, a lighterage clause was incorporated into the safe berth clause.

Pursuant to the lighterage clause, Humble Oil & Refining Company designated the m/t Esso Connecticut and the m/v Chester A. Poling as the lighters into which the s/s Amoco Delaware would discharge a portion of her cargo. (JA-12; Ex.7) At 1440 hours, on April 13, 1972, the s/s Amoco Delaware received the first line from the m/t Esso Connecticut and within 10 minutes the m/t Esso Connecticut was made fast to the starboard side of the s/s Amoco Delaware. (Ex.7; JA-149,162) The vessels were secured by five mooring lines (Ex.1 p.7), supplied by the m/t Esso Connec-

ticut, channeled through chocks and made fast to bitts on board the s/s Amoco Delaware; they were separated by fenders, both manila and rubber, supplied by the m/t Esso Connecticut (Ex.1 p.8). The cargo hoses also were supplied by the m/t Esso Connecticut and were connected to the manifold aboard the s/s Amoco Delaware. Discharge began at 1530 hours. (Ex.3)

At 1730 hours, just before the tide changed, the m/v Chester A. Poling was made fast to the portside of the s/s Amoco Delaware. A few minutes before, the m/t Esso Connecticut began to roll. (Ex.3; JA-149) At approximately 1735 hours the m/t Esso Connecticut began surging and slamming violently against the starboard side shell plating of the anchored s/s Amoco Delaware which was not rolling. (Ex.3) As a result certain of the plates were indented (JA-155; Ex.2 p.29,30; Ex.3; Ex.4 §31; Ex.5; Ex.6 §29,30; Ex.8; Ex.9 §4(A),7(B); T-105,111).

At the time of contact, the weather and sea conditions were not at all unusual. Visibility was approximately three miles; the wind was from east southeast at force 3-4; and a moderate westerly swell of about three to four feet was noted. (Ex.3; Ex.4; Ex.6; Ex.9).

At 1735 hours it became apparent that the efforts of the crew of the m/t Esso Connecticut to replace the fenders that had carried away and to put out additional lines

to replace the ones that had parted, would not keep the vessels apart. (JA-169). Captain Jarrett, Master of the s/s Amoco Delaware, deceased prior to institution of suit, then ordered the chief officer aboard the s/s Amoco Delaware to stop pumping and the m/t Esso Connecticut away. (JA-169) The hoses were disconnected within five minutes and the m/t Esso Connecticut was away from the starboard side of the s/s Amoco Delaware at 1745 hours, a scant 10 minutes after it became apparent that the crew of the m/t Esso Connecticut could not control their vessel. (Ex.3).

The s/s Amoco Delaware was placed into service, after having been jumboized and refitted, on or about December 22, 1971. April 13, 1972 was the first time that this jumboized vessel had ever lightened ship off Port Jefferson and neither her captain nor chief officer was familiar with the area.

The m/t Esso Connecticut is a self-propelled motor tank vessel of 1,729 gross tons, length overall of 276 feet and a breadth of 55 feet. She was constructed in 1969; is used primarily to lighten large tankers and has done so on numerous occasions off Port Jefferson. (Ex.1 p.14) Aboard her, at all pertinent times, was a captain and chief officer, both having vast lightering experience in and pilotage endorsements for the Port Jefferson area.

(JA-105; Ex.1 p.14,15,21). Both Captain Christensen and Mr. Bonde, the vessel's pilot computed the time of the tide change and the effect that it would have on both vessels during the operation in question. (Ex.1 p.37; T-115). During the lighterage operations, in particular, when the m/t Esso Connecticut began to roll, Bonde advised Captain Christensen, the master of the m/t Esso Connecticut, that in his opinion, as the vessel's pilot, a dangerous situation had arisen and that the vessel should leave the side of the s/s Amoco Delaware. Had Mr. Bonde's advice been heeded, this incident would not have occurred. (JA-155, 156).

On December 5, 1974, appellant received notice that the case was scheduled for trial on 48 hours notice on or after January 2, 1975. With the Court's notice in mind and the assumption that this matter would be tried and completed before mid-January, Mr. Chester Bysarovich, the Vice-President of Amoco Shipping Company and the only person alive and available who is familiar with the damage aspect of the action postponed a business trip to the Far East, originally scheduled for early January until the third week in January in order that he would be available to testify at trial. On January 8, 1975, plaintiff's counsel, realizing that the matter would most probably not be tried during the first half of the month and realizing that Mr. Bysarovich

would no longer be able to postpone his trip to Asia, filed an application (JA-24) praying that this matter not be set down for trial prior to February 10, 1975, the day after Mr. Bysarovich's expected return. On that same day, appellant's counsel was notified that this matter was scheduled for trial on January 21, 1975. Shipowner's application was originally denied, (JA-26), however, upon re-application an adjournment of the trial date was granted until at least February 10, 1975. (JA-28).

During this time, plaintiff's counsel was in constant contact with Mr. Bysarovich's office and was keeping a diligent eye on his schedule. Due to some unexpected and unforeseen complications pertaining to a new vessel's transfer and launching, Mr. Bysarovich was delayed in Japan and was not expected to return to New York until February 16, 1975. Immediately upon receiving this information, shipowner's counsel advised the Court and requested a one-week adjournment of the trial date (JA-31). This application was denied and the trial commenced on February 10, 1975, without shipowner's damage witness.

At trial, shipowner's counsel requested that the Court permit Mr. Bysarovich to testify during the week of February 17, 1975, either before the Court or by deposition. Shipowner's motion was denied. (JA-135,137,145).

After trial shipowners, once again, prayed for an order permitting the testimony of this important witness to be taken during the week of February 17, 1975. (JA-34, 35). Appellant highlighted the fact that the Court and counsel were notified by the court stenographer that the trial record would not be available for at least three weeks, however, once again, shipowner's motion was denied. (JA-37).

QUESTIONS PRESENTED

1. Did charterer, in refusing to pay the costs of repairs, breach its warranty under Clause 9 of the charter party and its implied warranty of workmanlike service?

2. Were the Trial Court's Findings of Fact and Conclusions of Law, (JA-38), that a properly anchored large vessel has a duty to protect a more manueverable lightering vessel, clearly erroneous?

3. Was the Trial Court's preclusion of Exhibit 4, a public document, and Exhibit 5, a business record, clearly erroneous?

4. Did the Trial Court err in failing to allocate the damages among the parties proportionately to the comparative degree of their fault?

5. Did the Trial Court abuse its discretion in refusing to give the shipowner an opportunity to produce a witness to prove damages?

POINT I

DEFENDANT, HUMBLE OIL & REFINING COMPANY, IN REFUSING TO PAY THE COSTS OF REPAIRS, BREACHED ITS WARRANTY UNDER CLAUSE 9 OF THE CHARTER PARTY AND ITS IMPLIED WARRANTY OF WORKMANLIKE SERVICE.

The error in the Court's finding that a duty was owed by those aboard the s/s Amoco Delaware to the m/t Esso Connecticut will be discussed in Point II. For this discussion, we will assume arguendo that the Trial Court's findings (JA-38) that those aboard the s/s Amoco Delaware did owe a duty to the m/t Esso Connecticut and that those aboard the s/s Amoco Delaware did breach this duty in a "relatively slight" degree, as characterized by the Trial Court, were correct.

Under both New York and Federal Maritime Law, one party to a contract may agree to indemnify another against the latter's own active negligence, where that intent is evident from the terms of the contract, as in the clear, unequivocal and explicit language of Clause 9 of the March 30, 1972 charter party. Warren v. Hudson Pulp & Paper Corp., 477 F.2d 229 (2nd Cir., 1973); Capozziello v. Brasileriro, 443 F.2d 1155 (2nd Cir., 1971); Rice v. Pennsylvania R. Co., 202 F.2d 861 (2nd Cir., 1953), a fortiori, a finding of "relatively slight" fault cannot preclude shipowner's recovery under an expressed agreement to indemnify.

It is academic that a charterer may agree to assume the duty to indemnify the shipowner against liability, Booth S.S. Co. v. Meier & Oelhaf, 262 F.2d 310 (2nd Cir., 1958), and that such agreement is subject to strict construction, Guarnieri v. Kewanee-Ross Corp., 263 F.2d 413, mod. 270 F.2d 575 (2nd Cir., 1959). It has been authoritively decided that it is "most reasonable" to construe indemnity agreements (warranties) to cover even those instances where negligence of the putative indemnitee was a proximate cause of the damage concurrent with the negligence of the putative indemnitor. U.S. v. Seckinger, 408 F.2d 146 (5 Cir., 1969); De Gioia v. U.S. Lines, 304 F.2d 421 (2d Cir., 1962); A/S J. Ludwig Mowinckels Rederi v. Commercial Steve. Co., 256 F.2d 227 cert. den. 358 U.S. 801 (2d Cir., 1958); Ace Tractor & Equip. Co. v. Olympic S.S. Co., Inc., 227 F.2d 274 (9 Cir., 1956); Standard Oil Co. of Texas v. Wampler, 218 F.2d 468 (5 Cir., 1955); Porello v. U.S., 94 F.Supp. 952 (SDNY, 1950).

Shipowner certainly agrees with the Court's assertion that its major argument is based upon the clear and unambiguous meaning of Clause 9 of the charter party; with this in mind, shipowner cannot understand the Trial Court's setting aside of this argument in the following terms: "The subject does not warrant extended discussion. Suffice it [sic] to say that the language plaintiff invokes cannot support a claim for alleged damages flowing from its own

negligence."

As pointed out above, it is basic maritime law that a charterer may indemnify the shipowner against liability, even against the latter's own active negligence. With this basic premise in mind, the plaintiff can only conclude that the Court's treatment of "plaintiff's major argument" resulted from an erroneous view of the law. Appellees' pre-trial contention that the pertinent terms only apply to cargo, (Trial Memorandum of Defendants, p.12), could certainly not have been adopted by the Court as no evidence had been received at trial supporting this contention.

Clause 9 is entitled "Safe Berthing-Shifting". In American law, the Safe Berth and/or Safe Port Clause is interpreted as an express assurance of the safety of the place indicated. This being so, it has been considered that the master can rely on the charterer's assurance and hold him liable for the ensuing damage, if the place should, in fact, prove to be unsafe. Ramberg, Unsafe Ports and Berths, (1967) p. 66; Cities Service Transportation Company v. Gulf Refining Company, 79 F.2d 521 (2d Cir., 1935), 1935 A.M.C. 1513.

The phrase, "always lie safely afloat", in the safe berth clause, is concerned exclusively with the marine character of the place of discharge, and requires that the

vessel should at all times be waterborne and able to remain there without risk of loss or damage from wind, weather or other properly navigated craft. Constantine and Pickering S.S. Co. v. West India S.S. Co., 199 Fed. 964 (SDNY 1912); Vardinoyannis v. The Egyptian General Petroleum Corp., 1971 2 Lloyd's Rep. 200.

Charterers are obligated, under the general terms of any clause stating that a vessel shall load and discharge at a safe place or wharf designated by them, and not mentioning lighterage, to name a port or place into which the chartered vessel can safely go with her whole cargo, and discharge that cargo without touching the ground. In other words, let us assume the parties had included only a safe berth clause which did not mention lighters, and without the "any lighterage being at the expense, risk and peril of the charterer" term. Under such a charter, owners would have been entitled, had it become necessary for the vessel to lighten ship upon her arrival in order to enter her berth safely, to refuse altogether to put into that port, as unsafe under the charter. (JA-63). In The Alhambra, (1881) 6 P.D. 68, and Reynolds v. Tomlinson, (1896) 1 Q.B. 586, for instance, charterers ordered the vessels involved to discharge at a port where the vessels could not lie without touching ground at low water (The Alhambra), or into which port the vessel could not go because it was loaded too deeply to cross the bars guarding the port entrance (Reynolds).

The masters of both vessels refused to put into the designated ports, and instead discharged their cargo at nearby alternate harbors. Charterers in both cases gave evidence of the custom of partial unloading outside the ports, and insisted that the owner's action was improper. However, both decisions upheld owner's action, deciding that the designated places were not "safe" within the meaning of the charter party, and that charterers had no claim. This is the law today - see Gilmore & Black, Law of Admiralty, p. 202 (2 Ed. 1975); Dominica Mining Co. v. Port Everglades Tow Co., 318 F.Supp. 500, 1970 A.M.C. 123 at 130, (S.D.Fla. 1969), aff'd per curium, 433 F.2d 986, 1971 A.M.C. 538; The Gazelle, 128 U.S. 474, 9 S.Ct. 139 (1888).

Charterers, Humble Oil & Refining Company, under Clause 9 of the charter party expressly warranted that, "the vessel shall load and discharge at any safe place or wharf or alongside vessels or lighters reachable on her arrival". (JA-12; Ex.7). A warrantor of a safe discharging place is ". . . liable independently of whether it was negligent or not in failing to ascertain that the berth was unsuitable". Eastern Mass. St. Ry. v. Trans Marine, 42 F.2d 58 at 62 (1st Cor. 1930) cert. den. 282 U.S. 883. As Judge L. Hand said in The Soerstad, 257 F. 130 (SDNY, 1919) a warranty is "a promise that a proposition of fact is true . . ."; "a promise to make whole the warrantee, if the warranty turns out to be false, . . . knowledge of the

falsity of the warrantee . . . is not . . . an element in the cause of action".

In this case, the parties specifically provided for lighterage in the safe berth clause, agreeing that such operations would be "at the expense, risk and peril of the charterer". (JA-12). This fact alone should be sufficient to dispose of charterer's pre-trial contention (Trial Memorandum of Defendants, p. 12) -- had this phrase been directed toward cargo then why put it under the heading of "Safe Berthing - Shifting", a clause clearly concerning the hull of the vessel. There are many possible lighterage provisions which the parties might have chosen, for instance, Bremen or Bayonne Lighterage clauses provide that lighterage will be at the "expense of the vessel", but "at the risk of cargo receivers" or "at merchant's risk" respectively; in the Centrocon Grain Charter, it is provided that the lighterage will be "at the expense and risk of the receiver of the cargo"; they might even have provided for lighterage to be at the "expense and risk of the vessel". However, the language actually chosen provided that the lighterage necessary to allow the vessel to reach her berth would be at the "expense, risk and peril of the charterer." This language was incorporated into charterer's safe berth warranty to the shipowner, plainly evidencing the party's intention to have this clause apply to the vessel, cargo and crew of

the s/s Amoco Delaware. So under this charter party, the shipowner, entitled to refuse to enter any port where lighterage was required as unsafe, waived its right so to object and agreed to lightering operations, on the condition that charterer guarantee its safety and undertake the cost and risk to the vessel of the operation. Gilmore & Black, Law of Admiralty, p. 204 (2 Ed. 1975).

The purpose of the "risk, expense and peril" clause from a commercial view point is as follows: The charterer wishing to take advantage of the s/s Amoco Delaware's carrying capacity, naturally, wished to have her sail from Baytown, Texas fully loaded. However, the vessel's deep draft, when fully loaded, is approximately 34 feet and neither Port Jefferson Harbor nor the Consolidated Oil Berth are capable of receiving a vessel of this draft. Charterer, fully aware of the owner's right to refuse to enter an unsafe berth and/or port, that is, one where the vessel cannot discharge "always safely afloat", due to the vessel's draft, bargained with the shipowner to waive its right of refusal to enter Port Jefferson and to allow the s/s Amoco Delaware to anchor off Port Jefferson and be lightened by lighters to be "designated and procured" by the charterer. In return for this accommodation charterer expressly agreed to assume all "risk, expense and peril" of the lighterage. (JA-62).

Shipowner also contends that the safe berth and/or port portion of the Clause 9 alone is sufficient to hold charterer, Humble Oil & Refining Company, liable. Following the Alhambra, Reynolds and Dominica Mining Co. decisions, it is obvious that Port Jefferson was not a safe berth and/or port with respect to a vessel of the s/s Amoco Delaware's draft. In fact, defendants have stipulated that it was necessary to lighten ship in order for the s/s Amoco Delaware to berth. (JA-63). As is pointed out in Vardinoyannis v. The Egyptian General Petroleum Corp., supra, a place of discharge can be made unsafe by another vessel, i.e., the m/t Esso Connecticut.

In Constantine & Pikering S.S. Co. v. West India S.S. Co., supra, the charterer was held to be liable for breach of express terms of the charter party, which required him to furnish a place where the vessel could be afloat under any conditions reasonably to be anticipated. In the case at hand, the lightering operation in question was certainly anticipated, as it was bargained for, and the lighters were "designated and procured" by the charterer, Humble Oil & Refining Company.

In Venore Transportation Company v. Oswego Shipping Corp., 1973 A.M.C. 363, 2150 F.Supp. 1366 (SDNY, 1973), the charterer was held to have breached his safe berth warranty when there were insufficient pontoons to keep the vessel

away from the pier under expectable weather conditions. A situation certainly analagous to the m/t Esso Connecticut's failure to either have a sufficient number of fenders or to have supplied defective fenders. See also, Athina Shipping Company, Ltd. v. Amerada Hess Corporation, 1972 A.M.C. 796 (M.D. Fla., 1971), not otherwise cited.

A charter party (Ex.7), like other contracts, is to be construed according to the plain sense and meaning of the terms which the parties have used; and if such terms are clear and unambiguous, they are to be understood in their plain, ordinary and popular sense. The terms in Clause 9, (JA-12), are clear and unambiguous and the intent of the parties, if the language used be given a reasonable construction, cannot be misunderstood. Williston on Contracts, §361, 362 (3 Ed. 1957).

The sine qua non of shipowner's argument under Clause 9 of the charter party is not that Port Jefferson is an unsafe port and/or berth. Its arguments under Clause 9 are, in fact, three-fold:

1. Defendants expressly warranted that the expense, risk and peril of the lightering operation, done to accommodate them, will be for their account, which they breached,

2. That, although the Port Jefferson anchorage was a safe berth and/or port when the s/s Amoco Delaware arrived and anchored, it became unsafe for the s/s Amoco

Delaware, as a result of the incident involving the m/t Esso Connecticut and therefore, charterer breached another express warranty -- to provide a safe berth and/or port, and,

3. That in failing to leave the s/s Amoco Delaware, the m/t Esso Connecticut with local knowledge of the weather and sea and insufficient and/or defective fenders and lines, breached its implied warranty of workmanlike service.

With the Clause 9 warranties in mind, especially charterer's warranty to bear all expense, risk and peril of the lighterage operation, it is immaterial if Port Jefferson was, in fact, a safe port and/or berth when the s/s Amoco Delaware anchored or if those aboard the s/s Amoco Delaware were, in fact, negligent to a "slight" degree.

In other words, charterer, Humble Oil & Refining Company, absolutely guaranteed to bear the expense, risk and peril of the lighterage operation and the safety of the port and/or berth is immaterial, in this context, and in no way effects this absolute warranty.

Shipowner's second argument under Clause 9, that the area became unsafe for the s/s Amoco Delaware due to the actions of the m/t Esso Connecticut and her agents, also, is not dependent upon the safety or unsafety of Port Jefferson before the lighterage operation began.

Appellees contend (Defendant's Post Trial Memorandum, p. 13) that the above argument "borders on the frivolous", however, it should be pointed out that they have offered no evidence to the contrary nor did they cite any authority to counter these arguments. On the other hand, shipowner has offered evidence, through the testimony of Captain Kingston, clearly establishing that its construction of the "lighterage to be at the expense, risk and peril of the charterer" clause is in line with both the plain and unambiguous meaning of the clause and the general accepted use and understanding of the clause in the maritime industry. (JA-62).

It should also be noted that the charter party in question is a form prepared by Esso International Inc., a close relative, on the Esso multi-national corporate family tree of the appellee, Humble Oil & Refining Co., presently known as Exxon Company, U.S.A. and is designated as "ESSOVOY 1969". Restatement of Contracts, §236 (1932). See also, Keaty v. Freeport Indonesia, Inc., 503 F.2d 955 (5th Cir., 1974) and Tenneco, Inc. v. Greate La Fourche Port Comm'n, 427 F.2d 1061 (5th Cir., 1970).

This Court was faced with an analogous fact pattern in Fairmont Shipping Corp., et al. v. Chevron International Oil Co., ____ F.2d ____, 1975 A.M.C. 261 (2d Cir., 1975). The issue before the Court at that time

was whether Chevron's contract to provide tug assistance imposed on Chevron and its sub-contractors or agents an obligation to perform in a workmanlike manner; the trial Court's finding of an implied warranty of workmanlike service was affirmed.

The District Court (371 Fed. Supp. 1191), resting on Ryan Stevedoring Co. v. Pan-Atlantic S.S Corp., 350 U.S. 124 (1956), emphasized the tug's expertise, control, supervision and ability to prevent accidents and held that because the tugs were in the best position to adopt measures to prevent the accident, but failed to do so and thereby caused the accident, there was a breach of Chevron's implied warranty of workmanlike performance.

In affirming the holding that the tugs breached their warranty of workmanlike performance, the Court noted that a warranty of workmanlike performance may be breached by non-negligent as well as by negligent conduct. Fairmont, supra, at 273; Atalia Societa Per Avioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 324 (1964), and based this finding on the basic hornbook rule of contract law that "one who contracts to provide services impliedly agrees to perform in a diligent and workmanlike manner". 9 S. Williston, Contracts, §1012 C, at 38-39 (3d Ed. Jaeger 1967).

Negligence alone will not bar shipowner from recovering for breach of warranty of workmanlike perfor-

mance. "Merely concurrent fault is not enough"; there must be "active 'hinderance'". Albanese v. N.V. Nederl. Amerik Stoomv. Maats., 346 F.2d 481, 484 (2d Cir.), rev'd. on other grounds, 382 U.S. 283 (1965); Fairmont, supra, at 273. There was no such hinderance here.

In sum, shipowner contends that the intent of the parties is clear; the terms of Clause 9 are clear and unambiguous and the Court need go no further to establish liability; charterer, Humble Oil & Refining Company, failed and neglected to perform its obligation under the charter party in that, it failed to provide the s/s Amoco Delaware with a safe berth and/or port and also, failed and refused to assume the risk, expense and peril of lightering the s/s Amoco Delaware and breached its implied warranty of workmanlike performance, none of which operates to relieve appellee-defendants of liability, even assuming negligence on the part of the personnel aboard the s/s Amoco Delaware.

POINT II

THE COURT'S FINDINGS OF FACT WITH RESPECT TO THE DUTY OWED BY THOSE ABOARD THE S/S AMOCO DELAWARE TO THE M/T ESSO CONNECTICUT ARE "CLEARLY ERRONEOUS" AND WERE INDUCED BY AN ERRONEOUS VIEW OF THE LAW.

The Trial Court's finding that:

> "Prudent management in the circumstances would have entailed action by the master of the s/s Amoco Delaware to make certain that the smaller, lightering craft, the Esso Connecticut, remained on the lee side throughout the operation. * * * In failing to take timely action to keep the Esso Connecticut on the protected side, those in charge of the Amoco Delaware were negligent, even though this should be and is deemed a case of relatively slight negligence." (JA-41),

is clearly erroneous; it flies in the face of the testimony adduced at trial, maritime custom and practice, good seamanship and long established maritime precedents.

The findings of the above mentioned duty and breach by the Court, were based on Mackey v. United States, 197 F.2d 241, 244 (2d Cir., 1952) and Continental Insurance Co. v. S.S. Alcoa Roamer, 1957 AMC 1522, 1525 (SDNY, 1957). (JA-41). These cases are in no way controlling and, in fact, it appears that their only relevance to the present action is their maritime flavor. Both are actions commenced to recover for damage to cargo or cargo loss and the main issues addressed in both actions were delivery of cargo and control of the "dumb barges" by the vessel.

In Mackey, supra, cargo loaded aboard dumb barges was lost during a "sudden storm" and the Court held that the barges or the lighters were under the "sole control" of the "mother" ship in that the lighters were not intended to be out in weather such as that encountered during the storm. In the second cited authority, also an action for loss of cargo, four dumb barges were held to be in the custody and control of the vessel when the severity of the wind and weather caused the lighters to surge heavily alongside, tending to increase the swing of the vessel, and causing the loss of cargo.

To understand the total irrelevance of the cited cases, one must first understand the difference between a "dumb barge" and the m/t Esso Connecticut, a "self-propelled barge". The barges used in both cases relied on by the Trial Court were wooden dumb barges and were not intended to be exposed to the degree of wind and weather encountered. Kerchove, International Maritime Dictionary, (2d Ed., 1961), defines a "dumb barge" as, "a barge which has no means of self-propulsion in the way of sails or engine power and which has to be towed or is allowed to drift under the influence of the tide or current." A dumb barge has no control over her own movements, must rely on a tug or tow and is usually manned by only one or two attendants. On the other extreme is the m/t Esso Connec-

ticut, a self-propelled motor tank vessel of 1,729 gross tons, length overall of 276 feet and a breadth of 55 feet, capable of ocean voyages, which is used primarily to lighten large tankers and manned by a captain and chief officer, both of whom were and are possessors of master's licenses with first class pilotage endorsements for the Long Island Sound area, issued by the United States Coast Guard, a United States Coast Guard licensed engineer and five crew members.

The m/t Esso Connecticut was under the control and custody of her own crew, capable of manuevering under her own power, certainly much more manueverable than the larger s/s Amoco Delaware. An additional point to be noted is that in both of the cited cases, the "dumb barges" encountered difficulty during severe weather and sea conditions; the conditions surrounding the incident here involved were not at all unusual. (Ex.3; Ex.4; Ex.6; Ex.9; T-116).

The law is well settled that a vessel underway (Esso Connecticut) is prima facie liable for damages due to a collision with an anchored vessel (Amoco Delaware), Oregon, 158 U.S. 186, 15 S.Ct. 804 (1895); Nip, 1964 AMC 748 (EDNY, 1964); Griffin, The American Law of Collision, (1962), Sec. 145 at page 348, and that she is not relieved of this liability because of tides or currents, for she is bound to

know and to allow for such conditions. Strout v. Foster, 1 How. (42 U.S.) 89 (1843). The m/t Esso Connecticut was underway as she was not "at anchor, or made fast to the shore, or aground", 33 U.S.C. 155. The logic underlying this rule is obviously based, in part, on the premise that certain vessels are unable to manuever as quickly and as easily as other types of vessels. For example, the s/s Amoco Delaware is a vessel of 27,778 deadweight tons with a length overall of 633 feet and the m/t Esso Connecticut is a self-propelled motor tank vessel of 1,729 gross tons and a length overall of 276 feet. It is apparent on these facts that the s/s Amoco Delaware, a vessel properly lying at anchor, had the highest degree of privilege and that the burdened vessel was, indeed, the m/t Esso Connecticut as she was underway and manueverable.

It is equally settled law, that when one vessel ties up to another, the consequences, whether to herself or to the other, are at her own risk. The Japan, 1925 AMC 931 (SDNY, 1912), not otherwise cited. The risk is that of the last comer, Pope v. Seckworth, 47 Fed. 830 (W.D.Pa., 1891), both as to injury to herself, The John Cottrell, 34 F. 907 (SDNY, 1888), and to others, The Lillian M. Vigus, 22 F. 747 (SDNY, 1994); the Atlas, 115 F. 856 (1902), aff'd 135 F. 1020 (2d Cir., 1905). On these facts, the m/t Esso Connecticut, a lighter, tied up to the anchored s/s Amoco Delaware assumed the risk of damage to either vessel. See Griffin, supra, §165.

When a vessel underway collides with a vessel at anchor, not only does a presumption in favor of the anchored vessel arise, but a presumption of fault on the part of the vessel underway (Esso Connecticut) arises shifting the burden of proof. Frost v. Gallup, 329 F. Supp. 310, 311 (D. R.I., 1971); Carlagena-Syra, 290 F. Supp. 260, 1968 A.M.C. 2235 (D.Md., 1968).

Appellees have not sustained their burden of proof nor have they overcome the presumption of fault. Their defense was to acknowledge that both Captain Christensen and Mr. Bonde, the pilot, have vast local knowledge of the Port Jefferson area (Ex.1 p.14,15,21; T-80,81,97); four fenders carried away and three lines parted, all were supplied by the Esso Connecticut (Ex.1 p.35, 38; Ex.2 p.20; Ex.9; T-99,101); the weather and sea conditions were not at all unusual (Ex.3; Ex.4; Ex.6; Ex.9; T-116); those aboard the Esso Connecticut realized that the vessel was in the trough of the sea, well before the collision, (JA-110,156); of course, Captain Christensen and Mr. Bonde knew the characteristics and limits of the m/t Esso Connecticut better than those aboard the s/s Amoco Delaware (T-73, 162); had the pilot's judgment been followed, there would have been no damage to the s/s Amoco Delaware (JA-40); the charterer sent both lighters to the s/s Amoco Delaware, one to be made fast on the starboard side, the other on the port side (Ex.1 p.16; Ex.7); the swing of the s/s Amoco Delaware

could not have been predicted, (JA-78,129; Ex.2 p.28), but had the s/s Amoco Delaware swung in the opposite direction, the m/v Chester A. Poling, a much lighter vessel, would have been in the trough of the sea (JA-99,149,154) and could have caused damage to herself and much more damage to the s/s Amoco Delaware, not to mention the greater possibility of an oil spill. (Ex.1 p.47). Countering these facts with the argument that Captain Jarrett, the s/s Amoco Delaware master, (deceased prior to institution of suit), should have anticipated the rolling of the m/t Esso Connecticut approximately one-half hour before the collision and forced the s/s Amoco Delaware to swing contrary to the way that the wind and weather took her, is clearly erroneous.

At this point, it should be mentioned that Captain Wheeler, appellees' "expert", by his own admission (T-152), has never served aboard a tank vessel and therefore, plaintiff submits, that he certainly cannot be considered an expert regarding tanker operations. Captain Wheeler has ventured the opinion that those aboard the s/s Amoco Delaware should have foreseen this incident, even though those aboard the m/t Esso Connecticut, with their vastly superior local knowledge, did not consider the situation to be dangerous until 1730 hours when the m/t Esso Connecticut began to roll (the s/s Amoco Delaware never rolled), (JA-119,156), and this opinion was apparently adopted by the Court.

Captain Kingston, shipowner's expert, testified that, in his over 40 years of tanker experience, he has never used a ship's engine to control the direction of her swing in an open anchorage, such as Port Jefferson, during lightering operations. (JA-91).

The m/t Esso Connecticut, even if adequately moored at the inception of the lighterage operation, had a duty to take additonal precautions in the face of the changing tide and other changing circumstances. The William E. Reis, et al., 152 F. 673 (6th Cir., 1907); Erie No. 51, 1929 AMC 794 (SDNY, 1929), not otherwise cited; The Bertha, 1929 AMC 1391 (SDNY, 1929), not otherwise cited. A vessel's moorings must be of a proper strength, properly made up and sufficiently taunt to keep her from being thrown against the vessel that she is moored alongside of. Malabar-Sekstant, 1931 AMC 890, 1158 (SDNY, 1931), not otherwise cited.

It is true, as appellees contend (Defendant's Post Trial Memorandum, p. 11), that under certain circumstances, the master of a vessel must take positive action to prevent damage to the vessel. The Virginia, Society of Maritime Arbitrators Award No. 313; Horn and Christensen Canadian Enterprises, Arbitration, 1971 AMC 362. It must be noted, however, that the circumstances in both of these arbitrations in no way parallels the facts of this case.

In both of the aforementioned arbitrations, the masters were confronted with strong winds and heavy seas which demanded affirmative action on behalf of the master. It should also be noted that in Horn and Christensen Canadian Enterprises, supra, the master was familiar with the berth and port in question, unlike the present situation where the master and chief officer of the s/s Amoco Delaware were not at all familiar with the Port Jefferson area. (Ex.2 p.26). In addition, shipowner wishes to point out that the master, officers and crew of the s/s Amoco Delaware did, in fact, take positive action when it became obvious that the efforts of the crew of the m/t Esso Connecticut would not be sufficient to keep the vessels apart. (Ex.2 p.25). The burden was not on the shipowner's agents to advise the master, officers and crew of the m/t Esso Connecticut to put out additional fenders and mooring lines, when, in fact, those aboard the m/t Esso Connecticut were the possessors of superior local knowledge. (This point will be discussed below.)

Shipowner submits that if appellees are to rely on the Virginia arbitration decision as indicated, (Trial Memorandum of Defendants, p. 10; Defendant's Post-Trial Memorandum, p. 12), they should rely on the entire decision. The majority opinion in the Virginia clearly points out that the master should have either stopped loading or, that shipowner should make his claim for damages directly against

the owner of the lighter and not against the charterer. (Emphasis suuplied). Accordingly, the Virginia decision strengthens shipowner's complaint against the m/t Esso Connecticut, as Humble Oil & Refining Co. was the vessel's owner as well as her charterer.

Any vessel, even one at anchor, which can take action to avoid a collision, must do so, if the corrective actions are within her power. The P. Dougherty Co. v. U.S., 168 F.2d 464, 1948 AMC 1149 (2d Cir., 1948). The anchored vessel is at first entitled to rely on the vessel underway, the m/t Esso Connecticut, to keep clear of her, The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7984 (D.Mass., 1873), as her first duty is to remain at rest and to give the moving vessel every opportunity to avoid the collision. Ceylon Maru, 266 F. 396 (D.Md., 1920) rev'd on other grounds 281 Fed. 533 (4th Cir., 1922). The s/s Amoco Delaware is also entitled to the benefit of any fair doubt and her conduct should not be scrutinized too closely, The Beaverton, 273 F. 539 (SDNY, 1919), nor is she obliged to act in an instant, without time for the exercise of judgment. Ceylon Maru, supra; The Suedco, 283 F. 796 (D.Ct., 1922).

As stated above, the anchored vessel (Amoco Delaware) cannot be compelled to resort to extraordinary measures. Atlantic Sun-Georgel, 245 F. Supp. 537 1965 AMC 662 (SDNY, 1965). Requiring the master of the Amoco Delaware

to exercise better judgment than that of both Captain Christensen and Pilot Bonde, men with superior local knowledge, and men who should best know the characteristics and limitations of the m/t Esso Connecticut, is fallacious on its face. Within minutes after the m/t Esso Connecticut began to roll and it became apparent that her crew could not keep her away from the s/s Amoco Delaware, Captain Jarrett ordered the pumps of the s/s Amoco Delaware stopped and the m/t Esso Connecticut away. (Ex.2 p. 25). During this time, at least four of the m/t Esso Connecticut's fenders carried away. (Ex.2 p.35; Ex.9). These fenders were all placed at a uniform height below the deck, a factor which alone is apparent negligence. Fenders positioned on a shaped vessel at a uniform height below the deck do not offer maximum protection. Maximum protection would have been afforded to both vessels had the fenders been staggered at various heights below the deck to protect the shell plating of both vessels in the event of a roll. (JA-65; E.1 p.9; Ex.2 p.29).

It is shipowner's position that, while it concedes that the master or mate aboard either vessel can always stop the unloading, it was entitled to rely upon the expertise of those aboard the m/t Esso Connecticut under the facts of this case.

It is a basic principium in law that if a party has, in fact, knowledge, skill or intelligence superior to that of the ordinary man, the law will demand of it conduct consistant with that superior standard. Seavy, Negligence-Subjective or Objective, 41 Harv.L. Rev. 1, 13 (1927); Second Restatement of Torts, §289, Comment m. See also, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Fairmont Shipping Co. v. Chevron Int. Oil Co., ___ F.2d ___, 1975 AMC 261 (2d Cir., 1975).

Captain Christensen, the master of the m/t Esso Connecticut and Mr. Bonde, her chief officer and pilot, have participated in lighterage operations off Port Jefferson with large anchored tank vessels on numerous occasions and both possess U.S. Coast Guard pilot endorsements for the Port Jefferson area. (Ex.1 p.14,15,21; JA-105). Mr. Bonde was acting as the m/t Esso Connecticut's pilot during all pertinent times, and as such is expected to be thoroughly familiar with the tide, wind, current and weather conditions off Port Jefferson. (Ex.1 p.7). As a matter of fact, both men, in furtherance of their duties as captain and pilot aboard the m/t Esso Connecticut, did, before the operations began, compute the time of the tide change and the effect that it would have on both vessels during lighterage. (JA-154; T-115).

Neither Captain Jarrett, the master of the s/s Amoco Delaware, nor Mr. Klaveness, the chief officer at all pertinent times had ever participated in a lightering operation aboard the s/s Amoco Delaware off Port Jefferson. On one prior occasion, in 1970, while serving aboard the s/s Trans Eastern, Mr. Klaveness did participate in a lightering operations off Port Jefferson. (Ex.2 p.26).

If the weather was such that fenders should have prevented the striking and slamming of the m/t Esso Connecticut against the side of the s/s Amoco Delaware, then the cause of the damage is attributable to the m/t Esso Connecticut because it had inadequate fenders. If, on the other hand, the weather was such that no amount of adequate properly placed fenders would have prevented the slamming and damage, then the damage resulting from the slamming is likewise attributable to the m/t Esso Connecticut which should have immediately departed from alongside without making the additional effort to put out additional fenders and replace mooring lines which parted. And further, because of their local knowledge, those aboard the m/t Esso Connecticut were in a position to evaluate the situation and attending circumstances which they, in fact, did by putting out more fenders and mooring lines. (JA-86, 90). As a matter of fact, Captain Christensen testified that, in all of her experience, he had never had an occasion when an officer of the vessel being lightened requested that

additional fenders be put out, (JA-107) and that in his opinion there was no action necessary on the part of those aboard the s/s Amoco Delaware. (JA-116).

See The Thomas Lysle, 48 F. 690 (D.Pa. 1892); Prosser, Handbook of the Law of Torts, §32 at 161 (4th Ed. 1971); Standard Dredging Corp. v. s/s Syra, 290 F.Supp. 260, 1968 AMC 2235 (D.Md. 1968).

The Trial Court's preclusion of Exhibits 4 and 5 were also clearly erroneous. Exhibit 4, a Report of Vessel Casualty or Accident, was filed with the Coast Guard pursuant to 33 U.S.C.A. §361 and 46 U.S.C.A. §239 and is clearly admissible as a public document and a record kept in the regular course of business under the theories set forth in United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792 (2d Cir.,1962); Caruthersville Towing Company v. John I. Hay Co., 344 F.2d 376 (5th Cir.,1964); Cox v. Esso Shipping Co., 247 F.2d 629 (5th Cir.,1957); Taylor v. Baltimore and Ohio R.R. Co., 344 F.2d 281, cert den. 382 U.S. 831 (2d Cir., 1965).

Exhibit 5 is the master's report of accident recorded in the ordinary course of shipowner's business, and, as such, is admissible under the Federal Business Records Act, 28 U.S.C.A. §1732. See, Gaussen v. United Fruit Co., 412 F.2d 72 (2d Cir., 1969); Vaccaro v. Alcoa S.S. Co., 405 F.2d 1133 (2d Cir.,1968); United States v. New York Foreign Trade Zone Operators Inc., supra; United States v. Dawson, 400 F.2d 194 (2d Cir.,1968) cert. den., 393 U.S. 1023.

POINT III

THE COURT BELOW ABUSED ITS DISCRETION IN REFUSING TO GIVE PLAINTIFF AN OPPORTUNITY TO PRODUCE A MATERIAL AND NECESSARY WITNESS TO PROVE DAMAGES.

No absolute and comprehensive rule can be laid down as to what matters will constitute good grounds for a continuance, but each case is to be determined by the Court in the exercise of a sound discretion on the basis of the particular facts and circumstances thereof. Michelson v. Moore-McCormack, 429 F.2d 394 (2d Cir., 1970); U.S. v. Ellenbogen, 365 F.2d 982 (2d Cir., 1966) cert. den., 386 U.S. 923. Generally, the absence of a material witness whose testimony is unavailable, is deemed to be sufficient grounds for a continuance. Hrabak v. Hummel, 55 F.Supp. 775, aff'd 143 F.2d 594 (3d Cir., 1944), cert. den. 323 U.S. 724.

The complaint was filed in this matter on January 14, 1974 and on August 30, 1974, the complaint was amended to include a second cause of action against defendant-charterer, Humble Oil & Refining Company, for breach of charter party. (JA-4). On December 5, 1974, appellant received a notice that the case was scheduled to be set down for trial on 48 hours notice on or after January 2, 1975. Immediately upon receiving said notice, appellant's counsel proceeded into the final stages of trial preparation, which included contacting and advising shipowner's witnesses that the matter

is scheduled to be set down for trial on 48 hours notice to insure their availability. Upon contacting Mr. Bysarovich, the vice-president of Amoco Shipping Company and the only person available who is familiar with the damage aspect of this action, counsel was advised that he was scheduled to leave on a business trip to Asia during the first week in January, however, he would certainly attempt to postpone his trip for as long as possible. Mr. Bysarovich did, in fact, postpone his trip on the assumption that the trial date would certainly be within a week or two after the ready date of January 2 and advised counsel that due to his Asian commitments, the maximum postponement would unfortunately be until the third week in January. Accordingly, on January 8, 1975, plaintiff's counsel, by affidavit of Richard A. Corwin, advised the Court of Mr. Bysarovich's commitments and expected date of return, and prayed that this matter not be set down for trial prior to February 10, 1975. (JA-24). On that same day, counsel was notified that this matter was to be tried on January 21, 1975. Shipowner's application was originally denied, (JA-26), however, upon re-application, the Court reconsidered its memorandum of January 8, 1975 and, without objection by defendant-appellees' counsel, granted plaintiff's application for an adjournment of the trial date until, at least, February 10, 1975. (JA-28). This second application, once again, pointed out that a continuance was reasonably necessary for a just determination of this matter, as Mr. Bysarovich was the only one familiar

with the damage aspects of this case and that such testimony would certainly be material and relevant and would most probably affect the result of the case. The Court was also advised that in light of the recent death of Odd Klaveness, the chief officer on board the s/s Amoco Delaware at all pertinent times and the death of the captain of the s/s Amoco Delaware, Mr. Bysarovich's testimony would be an absolute necessity.

During this time, shipowner's counsel was in constant contact with Mr. Bysarovich's office and was keeping a diligent eye on his schedule. Due to some unexpected and unforeseen complications pertaining to the vessel's transfer and launching in Japan, Mr. Bysarovich was delayed and was unable to return to New York until February 16, 1975. Counsel immediately and regretfully informed the Court of this fact and requested a one week adjournment of the trial date. (JA-31). This application was denied and appellant was informed that if it did not appear ready for trial on February 10, 1975, the action would be dismissed.

The trial commenced before Judge Marvin E. Frankel on February 10, 1975 and, as is evidenced by the following portion of the trial transcript, the absence of Mr. Bysarovich's testimony severely prejudiced the plaintiff-appellant's case:

"MR. WALKER: That being the case, your Honor, I rest, with the request that I be permitted to call another witness on damages when he is available next week, Mr. Bysarovich.

THE COURT: Mr. Bowles?

MR. BOWLES: I move to dismiss the complaint in this matter.

* * *

THE COURT: Let's go slowly, if you will. That request is denied, Mr. Walker. I don't know if you want me to make a long speech about the history of the adjournments in this case at the instance of the plaintiff and over the opposition of the defendant, but I must say your Mr. Bysarovich has been made most notably unavailable for an extensive period of time beyond the fair requirements of imposing both on your adversary and on the Court. We have given you as much delay as we fairly can having in mind the size and character of your client and of your firm and I don't think the Court should be subjected to this and I don't think the defendant should be subjected to it. So if you don't want to rest now, you want to do something about damages beyond what you have done, you may do that, but I'm not granting your application for a delay to keep this record open for another week. I think there is absolutely no justification for that. Indeed, I do want to point out that the original request for a very lengthy delay of this trial beyond the time for which I had set it was in your application a delay until February 10th. Then to my astonishment I learned the other day from your colleague that Mr. Bysarovich, because he had more important things to do wouldn't be around until February 16th, February 16th, and I don't think your opponent or I should be kept around waiting for him until he finds it convenient to come here and testify in his lawsuit. There are more things than that but I think that is enough to say. And I think in my duty to run this court and run this and several hundred other cases there is a limit which this would exceed on the degree which I

> am allowed to tolerate postponements and adjournments. I don't know where that leaves you and I appreciate you may have a problem about proving damages on which your case is not imposing as it now stands. I will give you to tomorrow to do something about that if you wish to. But no more. Mr. Bowles?" (JA-137,138,139).

Regarding the preceding statement by the Court, it should be noted that an adjournment of this case was never granted "over the opposition of the defendant"; in appellant's opinion, Mr. Bysarovich was not unavailable for an "extensive period of time"; in effect, appellant asked for less than a one month adjournment, which is certainly not unreasonable; the size and character of the appellant and of the appellant's attorneys is immaterial, especially when it was clearly pointed out to the Court on numerous occasions that Mr. Bysarovich is the only person available and alive capable of testifying to shipowner's damages; it was certainly not the intention of counsel to infer that Mr. Bysarovich had "more important things to do". Counsel merely attempted to point out that a short, reasonable, nonprejudicial delay would certainly be in the interests of justice, under these circumstances. The interests of justice, counsel assumed was the paramount concern.

The Court was admittedly aware of the plaintiff-appellant's predicament, as is evident by the following comment:

> ". . . I don't know where that leaves you and I appreciate you may have a problem about proving damages on which your case is not imposing as it now stands." (JA-139, emphasis supplied).

The Court did give appellant one day to produce Mr. Bysarovich, however, this was impossible as he was in mid-Pacific supervising the shakedown cruise of the newly acquired vessel.

On February 13, 1975, Judge Frankel again rejected shipowner's motion to permit Mr. Bysarovich to testify either before the Court or by deposition. (JA-37).

Appellant respectfully submits that the following factors should have been taken into consideration by the trial judge:

(1) That this matter was originally scheduled for trial on January 21, 1975 and was adjourned until February 10, 1975 on 48 hours notice, a mere 20-day adjournment;

(2) That this was a non-jury case;

(3) That even though appellant's applications for a continuance were initially denied, in view of the court reporter's advice to the Court and counsel that the trial record would not be available for at least 3 weeks, this was an extenuating factor in appellant's favor justifying the taking of Mr. Bysarovich's testimony in the interim;

(4) That the testimony of two material witnesses, Odd Klaveness, the chief mate aboard the s/s Amoco Delaware and Sven Bonde, the chief mate and pilot aboard the m/v Esso Connecticut was submitted to the Court in deposition form and that appellant requested that the Court permit the testimony of Mr. Bysarovich to be taken either before the Court or at appellant's counsel's offices during the week of February 17, 1975 and permit this testimony to be filed with or before the trial transcript;

(5) That the only possible inconvenience would have been the burden on the Court to read Mr. Bysarovich's deposition, a time expenditure of possibly one hour but, certainly, in the interest of justice.

The Court in ordering a new trial, in Gaspar v. Kassm, 493 F.2d 964 (3rd Cir., 1974), held that where testimony of a defendant was necessary for the defense of the case, the granting of a continuance would not have unduly prejudiced the other party, and where the continuance motion was not motivated by procrastination, bad planning or bad faith on the part of defendant or his counsel, the Trial Court abused its discretion in denying the continuance.

In Winston v. Prudential Lines Inc., 415 F.2d 619 (2d Cir., 1969) the Court, though emphasizing the trial judge's broad discretion in granting or denying requests of continuances cautioned that:

> "in the utilization of this discretionary latitude, the judges should also bear in mind that tight docket control, although a vital part of efficient judicial administration, is not an end in itself. The purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired. As we clearly stated in Davis, 405 F.2d 328 (2d Cir., 1968), cert. den., 393 U.S. 1085, 'a court must not let its zeal for a tidy calendar overcome its duty to do justice'. Id. at 331."

Though unwilling to hold that Judge McMahon's decision was so unreasonable as to be an abuse of a trial judge's discretion the Court emphasized that plaintiff's counsel had two obvious ways open to him by which he could have protected his case. First, realizing that his witness might not be available at all times, counsel could have taken the witness' deposition. Second, if counsel knew that his witness might not be available on the dates set for trial, he should have moved for relief prior to trial on the Calendar Rule 7(b)(1) of the Southern District of New York, rather than insisting that he was ready. The rule provides in part that:

> "When a case is advanced to the Ready Day Calendar, if there are any reasons why it may not proceed to trial on 24 hours telephonic notice, counsel should make immediate application to the Part I judge for an adjournment of the case on the calendar. * * * Such application must be made in the event that by reason of engagement or illness of counsel, unavailability or illness of witnesses, or for any other reason, the case cannot proceed to trial on 24 hours telephonic notice. The

> Part I judge will then make whatever disposition is necessary in the interests of justice. * * *" (Emphasis supplied.)

In Winston, plaintiff's counsel failed to adopt either of these possible avenues of relief as a hedge against the likelihood that his witness might not be available when needed and accordingly, the Circuit Court held that plaintiff must bear the unfortunate consequences

Nevertheless, the Court did establish specific guidelines to be followed in similar circumstances; guidelines followed by plaintiff. Firstly, plaintiff-appellant's counsel had no indication, prior to Mr. Bysarovich's departure to the Far East, that he might not be available on February 10, 1975, and it was only because of an uncontrolable delay in the Far East that Mr. Bysarovich subsequently became unavailable. Secondly, though Calendar Rule 7(b)(1) is no longer in effect in the Southern District, it is still the practice in the Southern District to follow the procedure outlined in 7(b)(1) in spirit, a procedure followed to the letter by appellant.

Whereas Judge McMahon, in Winston and, indeed, the Courts in almost all cases reported on this issue, had to contend with the inconvenience, complexity and confusion for the jury created by a continuance, Judge Frankel was spared this dilemma, as this action was non-jury and Mr. Bysarovich's testimony could have been taken either at the

Judge's convenience or at the offices of the appellant's counsel by deposition and the transcript of that deposition could have been submitted for the Judge's perusal along with the depositions of Klaveness and Bonde together with the trial record.

This Court advised in Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir., 1970), that the proper way for plaintiff's attorney to proceed when a material witness is unavailable is to present all testimony, depositions and other available evidence and then, request an adjournment to permit the material witness to testify, at that time, the judge could have assessed the importance of the testimony and considered whether or not to grant an adjournment. This was precisely the route taken by plaintiff's counsel and the judge did assess the importance of Mr. Bysarovich's testimony and, in fact, commented upon shipowner's failure to prove damages. See JA-139.

Appellant respectfully submits that the paramount consideration to be kept in mind by a trial judge when confronted with a motion for adjournment or continuance is as outlined by Judge Aldrich in Alamance Industries, Inc. v. Filene's, 291 F.2d 142, 146 (1st Cir., 1961):

> "Courts exist to serve the parties, and not to serve themselves, or to present a record with respect to dispatch of business. Complaints heard as to the laws, delays arise because the delay has injured litigants, not

> the courts. For the court to consider expediation for its own sake 'regardless' of the litigant is to emphasize secondary considerations over primary."

In conclusion, appellant respectfully submits that it was effectively denied the right to present its case because it could not establish a prima facie case on damages without Mr. Bysarovich's testimony and the Court's refusal to grant a continuance, deprived it of this testimony. Since neither plaintiff-appellant's counsel nor Mr. Bysarovich could foresee Mr. Bysarovich's delay in the Far East, preventing him from testifying personally or by deposition on February 10, 1975 and because counsel certainly did not delay in seeking an adjournment once the unexpected delay was made known, coupled with the additional factors that this case was non-jury; testimony of other material witnesses in deposition form was presented to the Court; the Court and counsels were informed that there would be at least a three week delay before the trial transcript would be received; post-trial briefs were to be submitted two weeks after receipt of the transcript; and reply briefs were filed one week thereafter, appellant submits that the Trial Court's refusal to grant a continuance or allow the testimony of Mr. Bysarovich to be taken by deposition, was arbitrary, capricious and an abuse of judicial discretion and certainly contrary to the interests of justice.

POINT IV

THE TRIAL COURT ERRED IN FAILING TO ALLOCATE THE DAMAGES AMONG THE PARTIES PROPORTIONATELY TO THE COMPARATIVE DEGREE OF THEIR FAULT.

Assuming that those aboard the s/s Amoco Delaware did owe a duty to the m/t Esso Connecticut and that this duty was breached in a "relatively slight" degree, as characterized by the Trial Court, (JA-41), damages should have been allocated among the parties in proportion with their comparative degree of fault. United States v. Reliable Transfer Co., Inc., 43 U.S.L.W. 4610 (U.S. May 19, 1975).

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE VACATED WITH A DIRECTION TO ENTER JUDGMENT, AS A MATTER OF LAW, IN FAVOR OF THE SHIPOWNER ON BOTH CAUSES OF ACTION AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A NEW TRIAL ON THE ISSUE OF DAMAGES WITH A DIRECTION REGARDING THE ADMISSIBILITY OF EXHIBITS 4 AND 5.

Respectfully submitted,

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EDWARD J. MURPHY

Of Counsel.

COURT OF APPEALS
for the Second Circuit

AMOCO SHIPPING COMPANY,

Plaintiff-Appellant,

- against -

HUMBLE OIL & REFINING COMPANY, et, ano.,

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 21st *day of* July *1975 at* **120 Broadway, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Kirlin Campbell & Keating

the **Attorneys** *in this action by delivering* 3 *true copy* cs *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 21st
day of July *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA